IN THE

# Supreme Court of the United States

OCTOBER TERM 1978

No. 78-596

MRS. CARNELL RUSS, VERNA RUSS, a minor, ROOSEVELT RUSS, a minor, ANGELA RUSS, a minor, CURTIS RUSS, a minor, SYLVIA RUSS, a minor, ANTHONY RUSS, a minor, TRANCE RUSS, a minor, and PATRICIA RUSS, a minor, by their mother and next friend, Mrs. Carnell Russ,

*Petitioners,*

—VS.—

CHARLES LEE RATLIFF,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners herein, Mrs. Carnell Russ and her several minor children, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on July 10, 1978.

### Opinions Below

Without a formal opinion, the United States District Court for the Eastern District of Arkansas, Pine Bluff Division, the Honorable Oren Harris presiding, issued an Order on November 10, 1978 denying the Petitioners Motion for Leave to Amend the jurisdictional averments and

to add a party Defendant (pursuant to Rule 15(c) of the Federal Rules of Civil Procedure). Said Order is not formally reported and is set forth herein, *infra,* as Appendix A.

A formal Order of Certification was entered by the District Court on December 8, 1978 It is not officially reported and is set forth herein, *infra,* as Appendix B.

A formal Order granting leave to take an interlocutory appeal herein was entered by the United States Court of Appeals for the Eighth Circuit on January 10, 1978. It is not officially reported and is set forth herein, *infra,* as Appendix C.

The opinion of the United States Court of Appeals for the Eighth Circuit is officially reported at 578 F. 2d 221 (8th Cir. 1978). Said opinion was entered on July 10, 1978.

## Jurisdiction

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on July 10, 1978. Jurisdiction of this Court is invoked, within ninety (90) days of the foregoing entry, pursuant to 28 U.S.C. Section 1254(1).

## Question Presented

Where a widow and eight surviving minor children of a Negro citizen sued municipal officials for the wrongful death of their husband and father (respectively), pursuant to the Civil Rights Act of 1871 (42 U.S.C. Section 1983) and liability was established over and against a municipal employee for constitutional wrong-doing resulting in the death of said Negro citizen, whether the Plaintiff should be permitted to add the municipal entity pursuant to Rule 15(c) of the Federal Rules of Civil Procedure, notwithstanding that the statute of limitations has run against said municipal entity.



## Statutory Provisions

This case involves Rule 15(c) of the Federal Rules of Civil Procedure. This subdivision is set forth herein, *infra,* as Appendix D.

## Statement of the Case

The suit arises from the fact that on the afternoon of May 31, 1971, Carnell Russ, a young black man who was married and the father of a number of minor children, was unjustifiably shot and killed by Respondent Charles Lee Ratliff who at the time was a member of the police force of Star City, Arkansas.

Star City is a municipality established pursuant to Arkansas law. It is the county seat of Lincoln County, Arkansas and is located some miles south of the larger city of Pine Bluff.

Prior to the shooting Russ had been arrested for speeding by Trooper Jerry Green, of the Arkansas State Police, and had been taken to the local jail in Star City which at the moment was the charge of Respondent Ratliff. The shooting occurred after the deceased and the Respondent became involved in an agreement about bail for the deceased.

The suit was filed in 1973 by the widow and minor children of the deceased (Petitioners herein) who sought damages on account of the killing of their husband and father. Jurisdiction was predicated upon 28 U.S.C. 1983 and the Eighth and Fourteenth Amendments to the United

States Constitution. In addition to Ratliff, Petitioners named as defendants State Trooper Green, who had arrested the deceased and who was present when the shooting occurred, Norman Draper, who was also present at the shooting, who on that date was being trained as a Star City policeman, and who was to assume his position in that capacity on the very next day, and the mayor and members of the city council of Star City. The City itself was not made a party to the suit.

The defendants answered and denied liability.

The Respondent defended his own case. The mayor, the members of the council, and Draper were represented by the city attorney of the City of Star City, Arkansas. Trooper Green was represented by an Assistant Attorney General of the State of Arkansas.

The case was tried to a jury with the Honorable Oren Harris presiding.

At the conclusion of Petitioners' case the trial judge granted directed verdicts in favor of the mayor and councilmen and in favor of Draper. The case went to the jury as against Trooper Green and Respondent Ratliff and the jury found in favor of both of those defendants. The trial court denied Petitioners' motion for judgment notwithstanding the verdict or alternatively for a new trial. The original appeal followed.

The United States Court of Appeals for the Eighth Circuit, in a decision handed down on July 26, 1976, affirmed the directed verdict over and against Mr. Draper and the mayor and members of the Star City, Arkansas City Council and affirmed the jury's action insofar as it exonerated Trooper Green; but it vacated the jury verdict insofar as it exonerated Respondent Ratliff and held that, in the face of the aggravated circumstances of the case and the total



lack of justification for the Respondent Ratliff's actions, the jury verdict exonerating Respondent Ratliff could not stand, as a matter of law. See: *Russ* v. *Ratliff*, 538 F.2d 799 (8th Cir. 1976).

Believing that the Circuit Court below committed several errors to the extent that it affirmed the judgment of the District Court, the Petitioners sought a rehearing en banc; but, in an Order dated August 18, 1976, the Court below denied the same.

This Court denied an original Petition for Certiorari to the United States Court of Appeals for the Eighth Circuit on January 10, 1977. See: *Russ* v. *Ratliff*, 429 U.S. 1041, 97 S. Ct. 740, 50 L. Ed. 2d 753 (1977).

Due to the procedural course that the case had taken during the trial, the Court below did not consider that Petitioners were entitled to judgment notwithstanding the verdict against Respondent Ratliff; and, as to him, the case was remanded for a new trial on all issues.

By the time the case got back to the District Court in 1977, Respondent Ratliff was no longer employed by the City and apparently had left the state. In any event, it seems highly doubtful that any substantial judgment against him would be collectible.

Confronted with the situation that has just been outlined, the Petitioners in September, 1977, filed a motion for leave to amend their complaint for the purpose of bringing the City of Star City, Arkansas into the case as a party defendant and asserting a claim against it on the basis of 28 U.S.C. 1331(a) read in connection with the Eighth and Fourteenth Amendments to the Constitution.

On November 10, 1977, the District Court, the Honorable Oren Harris presiding, heard arguments relative to the motion. The City of Star City, Arkansas was represented

by the very same city attorney who had previously represented the Mayor and City Councilmen of the City of Star City, Arkansas in the original pre-trial and trial proceedings held herein.

After considering the arguments, the District Court denied the Motion. Portions of the transcript of the proceedings on that date are set forth herein, *infra*, as Appendix E.

On November 10, 1977, the Court entered an Order denying the Motion. On December 8, 1977, the District Court entered an Order of Certification relative thereto; and on January 10, 1978, the United States Court of Appeals assumed jurisdiction over the interlocutory appeal.

As of that time, the City of Star City, Arkansas, was not considered a "person" suable under the provision of 42 U.S.C. 1983. See: *Monroe* v. *Pape*, 365 U.S. 167, 187-92, 81 Ct. 473, 5 L. Ed. 2d 492 (1961).

On July 10, 1978, the United States Court of Appeals for the Eighth Circuit entered an opinion and judgment affirming the action of the District Court in this regard. See: *Russ* v. *Ratliff*, 578 F. 2d 221 (8th Cir. 1978).

Believing that the Court below committed grievous error and that this case raises issues of substantial public importance, the Petitioners seek review from this Court. More specifically, they seek to have this Court clarify the legal definition of prejudice under Rule 15(c) of the Federal Rules of Civil Procedure and the degree to which an opposing party to a Motion thereunder must demonstrate the same in order to defeat such a motion.

Ultimately the Petitioners seek to have this Court determine whether a civil rights plaintiff, who has secured a finding of constitutional liability over and against a municipal employee for the wrongful death of a Black American



citizen, can amend his complaint jurisdictionally and add the municipal entity as a party defendant where he originally sued the Mayor and City councilmen of said municipal entity on several grounds, one of which is the grounds by which they seek to hold the municipal entity, itself, responsible for its employees' actions, notwithstanding that the statute of limitations has run against the municipal entity.

## Reasons for Granting the Writ

1. This Court has never determined whether a civil rights plaintiff, who initially sues municipal officials for the wrongful death of an American citizen, pursuant to the Civil Rights Act of 1871 (42 U.S.C. Section 1983) and secures a finding of liability over and against a municipal employee, as a matter of law, for the constitutional wrongdoing, can subsequently amend the jurisdictional averments and add the municipal entity, itself, as a party defendant, pursuant to Rule 15(c) of the Federal Rules of Civil Procedure, notwithstanding that the statute of limitations has run against the municipal entity.

Where a civil rights plaintiff initially sued the mayor and city councilmen of a municipal entity for the wrongful death of a Black American citizen and where constitutional liability was established over and against a policeman employed by the municipal entity, the plaintiff should be permitted to add the municipality to the law suit, pursuant to Rule 15(c) of the Federal Rules of Civil Procedure, notwithstanding that the statute of limitations has run, unless the municipality is able to demonstrate prejudice.

The Amendment to add a jurisdictional averment and, in conjunction therewith, to add a party defendant herein (the City of Star City, Arkansas) did not change a single issue in this case.

It was simply designed to Permit the Petitioners to collect on an inevitable monetary judgment from the treasury of the City of Star City, Arkansas, under the doctrine of respondeat superior (pursuant to 1331 jurisdiction),* liability having been found over and against the Respondent for the wrongful death of the Petitioners' decedent while said Respondent was in the employ of the City of Star City, Arkansas.

Since the Respondent was acting by and for the City of Star City, Arkansas as its employee and agent when he shot and killed the Petitioners' decedent, the Petitioners sought, as a matter of law, to look to the City for recovery of a monetary award since they believed that the Respondent had fled the jurisdiction of the trial court and that, in any event, he was judgment proof.

Thus, in order to give the Petitioners a complete remedy for the egregious action of the Respondent, as an employee of the City of Star City, Arkansas, it was absolutely essential that the Petitioners be permitted to amend the com-

*Because of the views expressed by the Court below, the issue of liability of a municipality under the doctrine of respondeat superior, pursuant to federal jurisdiction under 28 U.S.C. Section 1331, was not addressed. See: Footnote seven (7) in the decision of the Court below, 578 F. 2d at page 224. Petitioners submit that jurisdiction does exist over and against a municipal entity pursuant to 28 U.S.C. Section 1331 directly under the Fourteenth Amendment to the United States Constitution, See: *Owen* v. *City of Independence, Missouri*, 560 F. 2d 925 (8th Cir. 1977) *Petition for Cert. Filed* 46 U.S.L.W. 3438 (December 27, 1977); *Gentile* v. *Wallen*, 552 F. 2d 193 (2d Cir. 1977); *Sanabria* v. *Village of Monticello*, 424 F. Supp. 402 (S.D.N.Y. 1976); *Reeves* v. *City of Jackson*, 532 F. 2d 491 (5th Cir. 1976); *Shifrin* v. *Wilson*, 412 F. Supp. 1282 (D.C.D.C. 1976), and that the doctrine of respondeat superior is applicable thereunder, See: *Sanabria* v. *Village of Monticello, supra*, notwithstanding that such doctrine is not applicable over and against a municipal entity under the Civil Rights Act of 1871 (42 U.S.C. Section 1983). See: *Monell* v. *Department of Social Services of the City of New York*, —— U.S. ——, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).



plaint, jurisdictionally, and to add the necessary City defendant.

It is submitted that the City of Star City, Arkansas was on actual notice of the shooting incident and the legal action related thereto and heretofore prosecuted since its Mayor and Councilmen were initially defendants in the action before being dismissed by way of a directed verdict at the close of the Petitioners' case. It is obvious that the City of Star City, Arkansas must have been aware of this case since its officials themselves were aware of the law suit and since they retained counsel (the City attorney), collectively, for the purposes of defending themselves in their official capacities, counsel who represented the City itself in the context of the trial and appellate proceedings related to the motion *sub judice*.

In point of fact, the defendant Mayor and the defendant City Councilmen are so closely related to the City of Star City, Arkansas that the institution of law suit against them, initially, was in fact, an institution of the law suit against the City itself.

The trial Court below found the same when it concluded:

> "The Court: What is the difference between—as a matter of fact and reality—of the Mayor and City Councilmen having been defendants, wherein the case was tried; and the issues litigated, and the decision reached. And, then to bring the municipality in it—does not the Mayor and the City Council represent the City? Weren't they here as a Mayor and City Councilmen and therefore for the City of Star City, Arkansas."

See: Transcript of trial court proceedings below, November 10, 1977, at page 20, set forth in Appendix herein, *infra*. See also: Statement of Court at page 27 of transcript of proceedings, set forth in Appendix E herein, *infra*, where

the Court noted that: "Nobody could represent the municipality—Star City, except I presume the Mayor and City Council."

In effect, the District Court below denied the motion to amend and to add a party defendant because it did not believe such an amendment could be made to litigate liability under another theory and because apparently it presumed that an entire trial, both as to liability and damages, would have to be effected, substantially prejudicing the City of Star City, Arkansas. See: Transcript of trial court proceedings below, November 10, 1977, at pages 27-28, Appendix E herein, *infra.*

Needless to say, an amendment can be made to change a jurisdictional basis and to assert new theories arising out of the basic occurrence and transaction through which liability is sought. See: *Doran* v. *Lee,* 287 F. Supp. 807, 813 (W.D. Pa. 1968); *International Ladies Garment Workers Union* v. *Donnelly,* 121 F. 2d 561 (8th Cir. 1941). Moreover, a further trial on the issue of liability is not contemplated and is not necessary since the issue of liability has been resolved. The only issue is one of damages. See: Transcript of trial court proceedings below, November 10, 1977 at page 28, Appendix E herein, *infra.* Thus the only prejudice to the City was that it would, as a matter of law, incur liability as a consequence of the previously adjudicated finding of the same against its employee and in view of the compelling need for the same. No prejudice will result to the City by its joinder since the theory upon which the City is now sought to be held liable arises out of the same transaction and occurrence upon which Petitioners sought to secure liability over and against the Mayor and City Councilmen, to wit the wrongful death of the Petitioners' decedent by Respondent Ratliff. Significantly no additional evidence will have to be produced



since the theory holds the City liable, per force, under the doctrine of respondeat superior and attaches liability as to it on the already established liability over and against the Respondent, just as the Petitioners sought to hold the Mayor and City Councilmen liable thereunder (among other theories) *but failed solely because the jurisdictional averment foreclosed the same.* See: *Monell* v. *Department of Social Services of the City of New York, supra.*

As to the latter point, the Petitioners initially sought to hold the Mayor and City Councilmen of the City of Star City, Arkansas liable, in their official capacities, under the doctrine of respondeat superior as well as under the alternative doctrine of negligent entrustment; but the former theory was rejected both by the trial Court and the Court below under the precedent set forth in *Jennings* v. *Davis,* 476 F. 2d 1271 (8th Cir. 1973), cited by the Court below in its initial decision, herein where it set aside the jury verdict exonerating the Respondent and held that "under any version of the incident, the Police officer, Ratliff, who struck Russ with a pistol and then shot him, whether accidentally or otherwise, must be held to have used excessive force upon his prisoner." See: *Russ* v. *Ratliff, supra* at 538 F. 2d 805.

The doctrine of respondeat superior was rejected because the jurisdictional averment set forth by the Petitioners, more specifically 28 U.S.C. Section 1343 (3) and (4) in conjunction with the Civil Rights Act of 1871 (42 U.S.C. Section 1983) and the Fourteenth Amendment to the United States Constitution, forecloses application of the same to the Mayor and City Councilmen in their official capacities. See: *Monell* v. *Department of Social Services of the City of New York, supra* at 56 L. Ed. 2d 636.

However, the impediment to a finding of liability under the doctrine of respondeat superior, when sought under

the foregoing jurisdictional averment, is eliminated when jurisdiction is invoked under 28 U.S.C. Section 1331 which provides for a direct cause of action under the Fourteenth Amendment when the damages sought are in excess of $10,000.00 (ten thousand dollars) exclusive of interest and costs, as they are herein. See: *Sanabria* v. *Village of Monticello, supra* at pages 410-411.

Thus not only is there an identity of interest in the underlying occurrence, upon which the action herein is based, between the City of Star City, Arkansas and the Mayor and City Councilmen in their official capacities, but there is an absolute identity of theory upon which liability is sought to be based, to wit: the doctrine of respondeat superior.

Save for the substantive liability which the City of Star City, Arkansas would incur under the doctrine of respondeat superior should it be joined to the litigation, there is no demonstrated prejudice. Certainly substantive liability cannot be the basis for demonstrating prejudice; for, if such were so, a proposed defendant could seek to avoid liability merely because he/she would incur the same. Such a result would be unjust and defeat the purposes of litigation, itself. See: Federal Rule 15 (c) Relation Back to Amendment, 57 Minn. Law Review 83 (1972).

2. The decision of the Court below conflicts with the decision of the Third Circuit Court of Appeals as that Court has defined the degree to which prejudice must be established under Rule 15 of the Federal Rules of Civil Procedure in order to foreclose the addition of a new party subsequent to the running of the statute of limitations.

In *Deakyne* v. *Commissioners of Lewes*, 416 F. 2d 291, 300 (3rd Cir. 1969), the Third Circuit Court of Appeals held:



> "Prejudice under the rule (15(b)) means undue difficulty in prosecuting a lawsuit as a result of a change of tactics or theories on the part of the other party."

It is submitted that the same principle applies under Rule 15 (c) of the Federal Rules of Civil Procedure and that the City of Star City, Arkansas failed to demonstrate any undue difficulty whatsoever in defending itself as a result of the proposed amendment herein.

The City of Star City, Arkansas, as an Amicus before the Court below, argued that it would be prejudiced if the Petitioners' Motion was granted since the City Attorney would have cross examined Trooper Green and brought out inconsistencies, of some substance apparently, to establish that he, rather than Respondent Ratliff, was responsible for the death of Petitioners' decedent and the constitutional liability attendant thereto. The City noted that the attorney for the Petitioners did not undertake to cross examine Trooper Green. See: Excerpts from Brief of the City of Star City, Arkansas, as Amicus Curiae, in the Court below, Appendix F herein, *infra*.

It is submitted that something more than mere articulation that prejudice will accrue is required where, as here, it is apparent that the reason for refusing the amendment, at least at the appellate level below, was the conclusion that the City's defense was prejudiced by the fact that Trooper Green and Norman Draper, both of whom testified in the initial case and both of whom gave pre-trial depositions (whereat the City attorney was present and had the opportunity to cross examine), no longer had any interest in the trial and by the fact that the Respondent is no longer employed by the City and has left the state. In that regard, the Court below wrote:

> "In this case it is obvious that the City was aware of the pendency of the suit since the mayor, city council-

men, and Draper were named as defendants and were represented by the city attorney. We are not persuaded, however, that the City would not be prejudiced in its defense if put to trial today in view of the fact that Trooper Green and Norman Draper no longer have any interest in the case and of the further fact that Ratliff is no longer employed by the City and may have left the state."

See: *Russ* v. *Ratliff, supra* at 578 F. 2d 224.

If in fact the proposed City defendant would be prejudiced by the absence of Ratliff from the jurisdiction or by the potentially non interested nature of Draper and Green, it is submitted that it was incumbent upon the City to demonstrate the nature of that prejudice, not merely articulate the same and lead the Court to a speculative conclusion based thereon.

Addressing itself to the burden to show prejudice, the Third Circuit wrote in *Deakyne* v. *Commissioner of Lewes, supra* at note nineteen (19) at page 300 that:

"... Professor Moore states the 'test should be whether the defendant would be prejudiced by the implied amendment, i.e., whether he had a fair opportunity to defend and whether he could offer any additional evidence if the case were to be retried on a different theory.' * * * 3 Moore supra note 12 at ¶ 15.13 [2] p. 993. In the instant case, a continuance would have enabled appellee to offer any additional evidence, directly or by way of cross-examination, to contest the testimony presented by the Town on the public use and maintenance of Anglers Road. A new trial will afford appellee the same opportunity.

We do not believe delay alone is a sufficient measure of prejudice. In a thoughtful article on Rule 15, Donnici, The Amendment of Pleadings—A Study of the Operation of Judicial Discretion in the Federal Courts, 37 S. Cal. L. Rev. 529 (1964), the author concludes that the element of delay is pertinent only to extent that it combines with some extrinsic occurrence which brings about actual and significant prejudice to the opponent. It is the existence of such prejudice, not mere delay, which Federal Rule 15 establishes as a basis for denying the amendment. Id. at 547-548."



It is apparent from reading the decision of the Court below in the initial appeal thereto that, based on "any version of the incident," See: *Russ* v. *Ratliff, supra* at 538 F.2d 804, ". . . if the applicable section of the Civil Rights Act, 42 U.S.C. Section 1983, is to have any meaning in the face of these aggravated circumstances, the jury's verdict exonerating Ratliff cannot be permitted to stand." *Id.*

Prior to enunciating that position, the Court had analyzed the evidence in the trial court below and quoted extensively therefrom. See: *Russ* v. *Ratliff, supra* at 538 F. 2d 802-804. It is clear that the decision and opinion are based almost exclusively upon admissions of the Respondent and corroborated in large degree by the testimony of both Draper and Green.

Both Draper and Green were examined prior to trial; and the testimony elicited thereat was virtually the same as that elicited from them during the course of Green's case in rebuttal.

At the bottom line, there is nothing which can be elicited from Green or Draper which will, in fact, change the result herein. The story has been told; liability found; and really, there is nothing more to do than to assess the damages.

That the City Attorney only participated through the Plaintiffs case in main does not establish any prejudice since the evidence which came out during Defendant Green's case had little, if any bearing, on the Respondents liability, or on Green's personal liability.

In that regard, the Petitioners sought to premise liability over and against Trooper Green on the theory that the Petitioners' decedent was in the custody of Trooper Green at the time of the episode making him technically responsible for the care and well being of the decedent, as a matter of law. In addition, the Petitioners also sought to premise liability over Trooper Green on the theory that, but for his failure to give the decedent a copy of the ticket (which he had previously issued), the altercation and ultimate death (with its attendant constitutional dynamics) would not have taken place. Certainly, in that respect the testimony through other witnesses was an effort at establishing the same.

At the bottom line, Petitioners submit that there is nothing concrete to establish the prejudice which the City of Star City, Arkansas asserts would occur if it was joined to this litigation at this point. Trooper Green, having been exonerated, as a matter of law, by the Court below (after trial below), can add nothing to the case which he did not otherwise testify to in generally consistent form in the trial below and in other proceedings attendant thereto and independent thereof.

At the very least, the City of Star City should have been required to particularize the inconsistencies in testimony which, by cross examination, would have substantially altered the nature of the outcome of this litigation (insofar as the liability of Respondent Ratliff is concerned and Trooper Green). If the City was unable to articulate



the inconsistencies which could have been brought out by cross examination, then at the very least it should have been required to demonstrate, by proffer, evidence which it could secure or would secure and which would have materially and substantially altered the outcome of the litigation. The point is, as the Court below initially pointed out in its first decision, there is no such evidence. The evidence, premised largely on admissions of Respondent Ratliff and corroborated to a large extent by Green and Draper, is overwhelming as to the liability of Respondent Ratliff.

The City's articulated position of prejudice is specious, at best, and falls short of the legal obligation it incurred to demonstrate the same in order to foreclose joinder under Rule 15 (c) of the Federal Rules of Civil Procedure.

3. The decision of the Court below is inconsistent with the decisions of this Court, which address themselves to amendments pursuant to Rule 15 of the Federal Rules of Civil Procedures, and the underlying principles governing the same.

It is submitted that, without the Amendment, the Petitioners will have successfully prosecuted a constitutional and civil rights oriented matter, successfully established a serious deprivation of constitutional and civil rights (resulting in death), successfully secured a substantial judgment; and they will not be able to execute upon the same.

Such would be unjust and a true miscarriage of justice.

There can be no doubt that, from the outset of this litigation, the Petitioners realized that, if they were to secure a monetary judgment, it would have to come from the treasury of the City of Star City, Arkansas.

The City of Star City, Arkansas employed Respondent Ratliff as a policeman; and it was in his function as a

policeman for the City of Star City, Arkansas that the Respondent shot and killed the Petitioners' decedent, without justification and in reckless disregard of his physical and bodily integrity.

Thus, the Petitioners, recognizing that under *Monroe* v. *Pape, supra*, a municipal entity was not a person as defined under the Civil Rights Act of 1871 (42 U.S.C. Section 1983) and therefore not suable thereunder, sued in its place the Mayor, as Mayor, and the City Councilmen, as City Councilmen, recognizing and/or believing that recovery against them was, in effect, recovery against the City of Star City, Arkansas and, accordingly, payable out of the City treasury of the City of Star City, Arkansas.

Certainly, from the time that the Petitioners filed this law suit and continuing up to this very point in time, there has been a great deal of litigation revolving around the ability of an individual to recover damages over and against a municipality and out of its treasury for the deprivation of a constitutional right effected through the conduct of that municipality's employee.

While the Circuit Court below has for some time now adhered to the position that the doctrine of respondeat superior is not applicable under 42 U.S.C. Section 1983 to secure a monetary judgment from the municipal entity, through the naming of the Mayor (and premised upon the action of a municipal employee other than the Mayor), See: *Jennings* v. *Davis, supra*, it is only just recently that this Court addressed itself to said issue. See: *Monell* v. *Department of Social Services of the City of New York, supra*, where this Court adopts the foregoing position while overruling its holding in *Monroe* v. *Pape, supra* that a municipal entity is not a person under 42 U.S.C. Section 1983.



At the bottom line, then, is an aspect of law which is and has been in a great state of flux; and the Petitioners should not be penalized for the same where, as here, they have always looked to and toward the City of Star City, Arkansas and its treasury as the place where and from which they would ultimately secure damages if they prevailed in this litigation (as they have on the primary issue of liability).

It has been a long litigation and, as a consequence thereof, the Plaintiffs below (and the Petitioner herein) have been compelled to weather the waves of the storm which focuses around this very difficult question. To the extent that they are now benefiting from the length of this litigation, they should not be penalized for something which they have no control over (the state of the law).

To the extent they always sought recovery against the City of Star City, Arkansas, the refusal of the Courts below to grant the Petitioners leave to add said City (in effect re-name the previously sued Mayor, as Mayor, and City Councilmen, as City Councilmen) and to otherwise jurisdictionally amend, without any meaningful justification therefor, is inconsistent with the spirit of the Federal Rules and previously enunciated decisions of this Court which are designed to do substantial justice. See: *Foman* v. *Davis*, 371 U.S. 178, 181-182, 83 S. Ct. 227, 9 L.Ed. 2d 222, 225-26 (1962), where the Court wrote in this vein:

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decision on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits' *Conley* v.

*Gibson* 355 US 41, 2 L ed 2d 80, 78 S Ct. 99. The Rules themselves provide that they are to be construed to secure the just, speedy, and inexpensive determination of every action. Rule 1.

The Court of Appeals also erred in affirming the District Court's denial of petitioner's motion to vacate the judgment in order to allow amendment of the complaint. As appears from the record, the amendment would have done no more than state an alternative theory for recovery.

Rule 15 (a) declares that leave to amend shall be freely given when justice so requires; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed 1948) 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules."

See also: *Conley* v. *Gibson*, 355 U.S. 41, 47-48, 78 S. Ct. 99, 2 L. 2d 85-86 (1957); *Zenith Radio Corp* v. *Hazeltine Research*, 401 U.S. 321, 334-335, 91 S. Ct. 795, 28 L. Ed. 2d 77, 90 (1971); *United States* v. *Hougham*, 364 U.S. 310, 316-317, 81 S. Ct. 13, 5 L. Ed. 2d 8, 14-15 (1960) *Rehearing denied* 364 U.S. 938, 81 S. Ct. 376, 5 L. Ed. 2d 372 (1960).



In view of the foregoing, Petitioners submit that they should have been permitted to amend their complaint, jurisdictionally, and to add the City of Star City, Arkansas as a party Defendant to the action. Such action, in view of the identity of interest between the previously pled defendant City officials and the City, the absence of prejudice, and the magnitude of the constitutional violation, will assure that the Petitioners will secure the full and complete remedy to which they are entitled as a consequence of the egregious violation of the Petitioners' decedent federally guaranteed constitutional and civil rights and the wrongful death attendant thereto.

## CONCLUSION

For the foregoing reasons, the Petition herein should be granted.

Respectfully submitted,

.....

NATHANIEL R. JONES
JAMES I. MEYERSON
1790 Broadway—10th Floor
New York, New York 10019
(212) 245-2100

GEORGE VAN HOOK, JR.
307 South Hill
Post Office Box #474
El Dorado, Arkansas 71730
(501) 863-5119

*Attorneys for Petitioners*

By: .....

October 5, 1978.

**Certificate of Service**

James I. Meyerson, Esq. one of the attorneys for the Petitioners herein, certifies that on the 9th day of October, 1978, I did serve three (3) copies of the foregoing Petition upon the attorney for the City of Star City, Arkansas by mailing the same, postage prepaid, first class, as follows: Odell Carter, Esq., City Attorney, City of Star City, Arkansas, Post Office Box # 598, Star City, Arkansas 71667. In addition, I served three (3) copies of the same upon the Respondent by mailing the same, postage prepaid first class, at his last known address, as follows: Mr. Charles Lee Ratliff, General Post Office Delivery, Star City, Arkansas 71667.

Respectfully submitted,

.....

James I. Meyerson
1790 Broadway—10th Floor
New York, New York 10019
(212) 245-2100
*Attorney for Petitioners*

By: .....

**Appendices**

## APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

No. PB-73-C-96

---

MRS. CARNELL RUSS, ET AL.,

*Plaintiffs,*

VS.

CHARLES LEE RATLIFF,

*Defendant.*

---

ORDER

Complaint in this proceeding was intially filed on the 30th day of May, 1973, alleging that the civil rights of the plaintiffs' decedent had been violated, and alleging that this Court had jurisdiction pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1343 and the Fourteenth Amendment to the Constitution. The mayor and members of the city council of Star City, Arkansas were defendants, along with a former police officer of that city and others.

Pursuant to regular procedure, after extensive pre-trial proceedings, the matter was tried to a jury. During the trial and at the close of the evidence of plaintiffs, the Court directed a verdict in favor of the defendants, the Mayor and members of the city council of Star City, Arkansas. This ruling was appealed to the Court of Appeals for the Eighth Circuit, which affirmed the ruling of this Court in its opinion filed July 27, 1976. Rehearing was denied August 8, 1976. Petition for writ of certiorari to the United States Supreme Court was denied January 10, 1977.

Plaintiffs, on September 30, 1977, filed motion for leave to amend to add the City of Star City, Arkansas to this

action as a defendant, and to amend the allegations of the complaint to assert jurisdiction pursuant to 28 U.S.C. § 1331.

This matter has been filed some four and one-half years, has been the subject of numerous pre-trial proceedings and conferences, has been tried to a jury for a full week, has been on appeal to the Court of Appeals, which rendered a decision upholding the dismissal of the plaintiffs' complaint against the mayor and city councilmen of Star City, and the Supreme Court of the United States has denied certiorari. But for the remand of this cause for re-trial of the claims of the plaintiffs against Charles Lee Ratliff, there would be no action pending regarding the allegations of plaintiffs. The Court can perceive no reasonable justification for the delay in asserting for the first time that jurisdiction is invoked pursuant to 28 U.S.C. § 1331.

Further, the motion has been expanded, seeking to have the former defendants, the mayor and city councilmen, again brought into this action as parties defendant. This despite a full hearing in a trial before a jury, the determination by this Court that plaintiffs had not made out a case against these defendants and granting a directed verdict, and the affirmance of this ruling by the Court of Appeals. The Court is satisfied that plaintiffs have had their full and fair opportunity to make out a case as to those defendants, have had their "days in court", and are not entitled to assert the same allegations of fact to seek damages against these defendants on the basis of a new theory. Res judicata must have some meaning, and the present motion presents all of the elements for its assertion as to the mayor and councilmen.

Plaintiffs have further filed motion for change of venue and suggested that the Court recuse himself because the



Court of Appeals reversed a determination of fact by the jury. The motion is supported only by affidavit of counsel.

The Court fully intends to set this cause for re-trial as to the allegations of plaintiffs against the remaining defendant, Charle Lee Ratliff, pursuant to the directions of the Court of Appeals, as expeditiously as the demands upon the time of this Court will allow. Delay in re-trial has been primarily due to the requirements of the Speedy Trial Act for giving first priority to criminal actions.

The Court has carefully reviewed the motions filed by plaintiffs and has determined that they are without merit at this stage of the proceedings. This Court, and a jury which will be selected from the entire Pine Bluffs Division by the random selection process, have no presumptive bias against the plaintiffs and their claims. Certainly this Court has no bias or resentment arising from the rulings of the Court of Appeals, or any other source in this matter.

IT IS, THEREFORE, ORDERED that the motions of the plaintiffs for the addition of parties defendant, for leave to amend their complaint to assert a new basis for their cause of action, for a change of venue, and that this Court recuse himself, be and the same are hereby denied.

Dated: November 10, 1977

/s/ OREN HARRIS
*United States Senior District Judge*

## APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

CIVIL NO. PB-73-96

---

MRS. CARNELL RUSS, ET AL.,

*Plaintiffs,*

VS.

CHARLES LEE RATLIFF,

*Defendant.*

---

ORDER OF CERTIFICATION

It is the opinion of this Court that the attached Order and opinion attendant thereto inspire controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal therefrom may materially advance the ultimate termination of this litigation.

/s/ OREN HARRIS
*United States District Judge*

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
Dec 8 1977
W. H. MCCLELLAN, CLERK

By: .....
DEP. CLERK



*Appendix B*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

No. PB-73-C-96

---

MRS. CARNELL RUSS, ET AL.,

*Plaintiffs,*

VS.

CHARLES LEE RATLIFF,

*Defendant.*

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ORDER

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Pursuant to regular procedure, after extensive pre-trial proceedings, the matter was tried to a jury. During the trial and at the close of the evidence of plaintiffs, the Court directed a verdict in favor of the defendants, the Mayor and members of the city council of Star City, Arkansas. This ruling was appealed to the Court of Appeals for the Eighth Circuit, which affirmed the ruling of this Court in its opinion filed July 27, 1976. Rehearing was denied August 8, 1976. Petition for writ of certiorari to the United States Supreme Court was denied January 10, 1977.

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action as a defendant, and to amend the allegations of the complaint to assert jurisdiction pursuant to 28 U.S.C. § 1331.

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Court of Appeals reversed a determination of fact by the jury. The motion is supported only by affidavit of counsel.

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The Court has carefully reviewed the motions filed by plaintiffs and has determined that they are without merit at this stage of the proceedings. This Court, and a jury which will be selected from the entire Pine Bluff Division by the random selection process, have no presumptive bias against the plaintiffs and their claims. Certainly this Court has no bias or resentment arising from the rulings of the Court of Appeals, or any other source in this matter.

IT IS, THEREFORE, ORDERED that the motions of the plaintiffs for the addition of parties defendant, for leave to amend their complaint to assert a new basis for their cause of action, for a change of venue, and that this Court recuse himself, be and the same are hereby denied.

Dated: November 10, 1977.

/s/ OREN HARRIS
*United States Senior District Judge*

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
Nov 10 1977
W. H. MCCLELLAN, CLERK

By: .....
DEP. CLERK

## APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 78-1020—September Term, 1977

---

MRS. CARNELL RUSS, ET AL.,

*Petitioners,*

vs.

CHARLES LEE RATLIFF,

*Respondent.*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

Petition for leave to take interlocutory appeal in this cause has been considered by the Court and is granted. The Clerk of this Court is directed to regularly docket this appeal.

January 10, 1978



## APPENDIX D

### Rule 15(c) of the Federal Rules of Civil Procedure

(c) *Relation Back of Amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

## APPENDIX E

[20] • • •

The Court: What is the difference between—as a matter of fact and reality—of the Mayor and the City Councilmen having been defendants, wherein the case was tried; the issues litigated, and decision reached. And, then to bring the municipality in it—does not the Mayor and the City Council represent the City? Weren't they here as a Mayor and City Councilmen and therefore for the City of Star City?

Mr. Meyerson: Oh, I would agree. • • •

• • • • •

[27] Mr. Meyerson: That is correct, Your Honor.

The Court: The interpretation of Rule 15 (c) seems to be an unusual interpretation by counsel, at this particular stage of the case. It's a rather unusual—to me—a rather unusual argument that you merely can change jurisdiction in the case after it has been litigated under one theory, and then under this authorization you can completely avoid—or do away with the statute of limitations. Therefore, the Court just cannot see the position that is urged upon the Court here of having validity, and I am constrained to hold that the motion to add another party—and, the party being Star City, Arkansas—at this time, would—would stand. I think there is something to the contention of counsel for the City—the municipality of Star City about the passing of time and the standing—or the status of the parties that would be involved in it. Nobody could represent the municipality—Star City, except I presume the Mayor and the City Council. And, consequently, recognizing the importance of this matter, and the very great effort that is being made to do something for the plaintiff; the Court does not



*Appendix E*

feel that this action should be permitted at this time, and [28] the motion will be denied.

On the question of venue I cannot see that there would be any prejudice whatsoever—in view of the status of this case because counsel has already said to this court that there would not be any new evidence. It would be virtually the retrial as to liability. The Circuit Court of Appeals has virtually said liability is already established insofar as the defendant is concerned in the case, and therefore, the major question to be presented to a jury—the question of damage. • • •

• • • • •

## APPENDIX F

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 78-1020

---

MRS. CARNELL RUSS, ET AL.,
*Appellants,*

VS.

CHARLES LEE RATLIFF,
*Appellee.*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

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## *AMICUS CURIAE* BRIEF OF THE CITY OF STAR CITY, ARKANSAS

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BY: ODELL C. CARTER
P. O. Box 598
Star City, Arkansas 71667
*Attorney for Amicus Curiae*

* * * * *

If the City of Star City, Arkansas, was made a party at this late date it would be very much prejudiced by the additional fact that Trooper Jerry Mac Green is no longer a party to this lawsuit and the City, therefore, would be precluded from bringing him back into this cause of action



and implicating him as it could have done if the City had been a party to the original suit in that the testimony of Mr. Green at the trial of Mr. Ratliff in the Circuit Court of Lincoln County, Arkansas, for manslaughter was vastly different from what it was on the trial of this case in Federal Court which could have made a difference in the outcome if these discrepancies had been pointed out, and if Mr. Ratliff had been adequately represented—he having represented himself—which all could very likely be to the detriment of the City of Star City if it had to defend at this time.

Furthermore, as admitted by the appellants the City of Star City, Arkansas, now has a different City Council, one of the old members, G. D. Smith, Sr., now being deceased, and the former Mayor, Lynn Thomasson, now being quite elderly, all of which would prejudice the City of Star City in its defense if it was now made a party defendant.

* * * * *